STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: October 20, 2022)

WATCH HILL FIRE DISTRICT, ***Appellant,***	:	
v.	:	**C.A. No. WC-2021-0195**
WESTERLY ZONING BOARD OF REVIEW; WALTER PAWELKIEWICZ; LAWRENCE CIOPPA; JEFFREY RUSSO; JAMES TORRES; DAWN ROBINSON; and DOUG BROCKWAY; in their capacities as Members of the WESTERLY ZONING BOARD OF REVIEW; and ZOEY WATCH HILL, LLC, ***Appellees.***	:	

consolidated with

MACLEAR FAMILY REVOCABLE TRUST, by its Trustee MALCOLM MACLEAR; RICHARD H. SAYRE and ELISABETH N. SAYRE, ***Appellants,***	:	
v.	:	**C.A. No. WC-2021-0199**
WESTERLY ZONING BOARD OF REVIEW; WALTER PAWELKIEWICZ; LAWRENCE CIOPPA; JEFFREY RUSSO; JAMES TORRES; DAWN ROBINSON; and DOUG BROCKWAY; in their capacities as Members of the WESTERLY ZONING BOARD OF REVIEW; and ZOEY WATCH HILL, LLC, ***Appellees.***	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is a zoning appeal of the Watch Hill Fire District consolidated with an appeal by the MacLear Family Revocable Trust, by its Trustee

Malcolm MacLear; Richard H. Sayre; and Elisabeth N. Sayre (collectively, Appellants)[1] from the April 8, 2021 written decision (Decision) of the Town of Westerly Zoning Board of Review (Zoning Board) approving a dimensional variance for property owned by Appellee Zoey Watch Hill, LLC (Petitioner). Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel[2]

A

Dimensional Variance Application

Michael Schwartz is the sole member of Zoey Watch Hill, LLC, which currently owns the subject property at 14 Larkin Road in Westerly, Rhode Island (Property).[3] (Tr. 2:3-4, 32:2-5, Dec. 3, 2020.) The Property is located in the Watch Hill area of Westerly, Rhode Island, adjacent to the historic Flying Horse Carousel. (Dimensional Variance Submission, Oct. 20, 2020 at 1; Tr. 116:1-4, Mar. 25, 2021.)

The Property is zoned Low Density Residential (LDR) 43, requiring a minimum lot size of 43,000 square feet for a single-family residence. (Tr. 4:22-25, Dec. 3, 2020.) The subject lot, however, is approximately 3,049 square feet and is therefore a "dimensionally pre-existing, non-conforming condition." (Decision 2; Tr. 5:1-4, Dec. 3, 2020.) As a result of its small size, the setback requirements for front, rear, and sidelines all overlap such that it would be impossible to legally construct a residence on the Property today. (Decision 10-11, ¶ 1.) The lot is also shaped

[1] The MacLear Family Revocable Trust, Richard H. Sayre, and Elisabeth N. Sayre adopt the Watch Hill Fire District's arguments in full. (Br. of MacLear Family Revocable Trust in Support of Appeal 5.) This Decision will therefore cite exclusively to the Watch Hill Fire District's Memorandum of Law (Appellants' Mem.) as Appellants' collective argument.

[2] This section will provide a general overview of the travel of this appeal and the history of the underlying dimensional variance application. Additional facts will be referenced in the body of the Analysis where appropriate.

[3] This Decision will therefore refer to Appellee using the pronouns "he," "his," and "him."

like a figure "seven." *Id.* The residential structure on the Property was built in 1938. *Id.* It consists of a ground floor garage and mechanical room, with stairs to a first floor comprised of two bedrooms, a bathroom, a kitchen, and a living area, totaling 577 square feet, exclusive of an exterior deck that measures approximately 126 square feet.[4] *Id.*; Tr. 67:3-5, Mar. 25, 2021.

On October 20, 2020, Petitioner submitted a request for a dimensional variance (Application) proposing to: (1) elevate the home to create two levels of living space totaling 1,128 square feet; (2) renovate and reduce the size of the ground floor garage to 300 square feet; (3) renovate the interior and exterior features of the home; (4) add a second deck off of the new living level that would be larger than the existing deck; (5) add a new roof deck to conceal heating and cooling appliances; and (6) replace the existing cesspool with a denitrification system. (Appl. ¶ 15; *id.* at Ex. "Narrative of Proposed Project" 3-6; Tr. 51:3-8, Mar. 25, 2021.)[5] Based on Petitioner's design plan, the first floor would include a mechanical room and two bedrooms, each with a bathroom, and the second floor would include a kitchen, bathroom, and great room. (Appl. Ex. "Narrative of Proposed Project" 4.)

B

December 3, 2020 Zoning Board Hearing

The Zoning Board first considered the Application at a December 3, 2020 hearing. Westerly zoning official, Nathan Reichert, provided an overview of Petitioner's proposal and recommended approval based on the improvements to both the structure and Watch Hill's overall flood resiliency. (Tr. 4:14-9:2, Dec. 3, 2020.) Petitioner testified as to the nature and

[4] To avoid confusion, this Decision will reference the garage level as the "ground floor" and each level of living space as the "first floor" and "second floor" in ascending order.

[5] Exhibits in the certified record are neither marked nor consecutively paginated and will be identified in this Decision by the document name followed by its internal pagination, if applicable.

extent of his proposal and presented testimony from his architect, Wayne Garrick, and his land surveyor, Jeffrey Balch. *See generally id.* at 12-63.

Four members of the public spoke in opposition to Petitioner's proposal, including a representative of the Watch Hill Conservancy, Malcolm MacLear, and two neighboring property owners. *Id.* at 64-79. Public comment generally focused on the following complaints: (1) Increasing the height of the structure would intensify the burden of the existing setback encroachments, *id.* at 66:17-67:9; (2) Petitioner's desire for greater flood resiliency, specifically his argument that additional elevation was required for Federal Emergency Management Agency (FEMA) regulatory compliance, did not necessitate adding a full second level to the structure, *id.* at 68:2-23; (3) The proposed design, specifically its height and multiple decks, was out of conformance with the surrounding area, *id.* at 67:23-68:1, 68:23-69:6, 75:8-17; 76:25-77:7, 78:22-79:2; and (4) Two neighboring property owners speculated that the Property would be used as a rental or as a "financial transaction," *id.* at 77:7-11; 79:5-15.

During the hearing, Appellants' counsel argued in opposition stating that Petitioner had not established a hardship and that, in any event, Petitioner's proposal impermissibly sought to demolish and reconstruct in violation of Westerly Zoning Ordinance § 260-32(C)(2). At the conclusion of comments and arguments, the Zoning Board voted to continue consideration in future hearings. *Id.* at 97:5-7.

C

March 25, 2021 Zoning Board Hearing

On March 25, 2021, the Zoning Board resumed public hearing and comment on Petitioner's Application and conducted a polling of the board members. *See generally* Tr., Mar. 25, 2021.) After arguments of counsel, Petitioner once again testified regarding the nature and

extent of the project, as did Mr. Garrick and Petitioner's structural engineer, Thomas Gillespie. *See generally id.* at 32-125. Mr. Garrick testified that the recommended minimum size of a single-family residence, based on guidelines from the federal Department of Housing and Urban Development (HUD), was 960 square feet. *Id.* at 49:9-12, 60:16-20, 63:2-16. Mr. Garrick also testified that Petitioner's latest project revision reduced the size of the second deck to eliminate any additional encroachment beyond the structure's existing footprint. *Id.* at 97:14-99:10.

Mr. Garrick stated that the renovated home would retain the original framing, roof rafters, studs, and sheathing, which were in "excellent condition." *Id.* at 39:9-15, 46:7-23. In Mr. Garrick's opinion, the first and second levels in the renovated structure would be comprised of the existing house's ground floor and first level, "[j]ust lifted up" or "elevated." *Id.* at 47:3-10. Both Mr. Garrick and Mr. Gillespie explained how the existing structure would be separated from the garage foundation and lifted onto new helical piles. *Id.* at 72:14-73:4, 117:9-120:21. In response to a question from board member Jeffrey Russo, Mr. Reichert testified that, based on his experience with renovation and rebuilding projects after the destruction of 2012 tropical storm "Sandy," he considered this project a renovation and not a demolition. *Id.* at 70:6-72:13.

At the close of the March 25, 2021 hearing, the Zoning Board voted 4-1 to approve the Application and further voted to permit staff to prepare a written decision. *Id.* at 181:12-202:18.

D

The Zoning Board's Written Decision

On April 8, 2021, the Zoning Board issued its written Decision approving the dimensional variance. *See generally* Decision. In the Decision, the Zoning Board approved:

> "[A] variance for the vertical expansion only of the pre-existing non-conforming structure at 14 Larkin Road to a height of 33.0', thereby approving application of the existing 20.6' front yard variance, 28.6' right side yard variance, 27.7' left side yard

> variance, and 14.07' rear yard variance, to renovate, and elevate the existing structure one-story, add a roof deck, add one rear deck to the new living space, and make the home compliant with FEMA flood zone requirements at 14 Larkin Road pursuant to *Section 260-33 Variances* of the Town of Westerly Zoning Ordinance." *Id.* at 1.

The Decision summarized Petitioner's proposal as well as all hearing testimony and arguments of counsel and included a list of materials in the written record before the Zoning Board. (Decision 2-9.) The Decision then addressed the dimensional variance standard, enumerating the Zoning Board's conclusions of law and supporting factual determinations, which included that: (1) there existed a hardship due to the unique characteristics of the land or structure, *id.* at 10-11, ¶ 1; (2) the hardship did not result primarily from Petitioner's desire to realize financial gain nor from his own prior action, *id.* at 11, ¶ 2; (3) the proposal would not alter the character of the surrounding area, *id.* at 11-12, ¶ 3; (4) Petitioner's proposal afforded him the least relief necessary, *id.* at 12, ¶ 4; and (5) the hardship amounted to more than a mere inconvenience because "[t]he Applicant does not seek to expand the footprint . . . [and] is only expanding vertically to gain the necessary space to reasonably enjoy the permitted residential use," *id.* at 12-13, ¶ 5.

The written Decision next addressed the contention that the proposal involved an impermissible demolition and reconstruction. *Id.* at 13. The Zoning Board determined that Petitioner sought to elevate and renovate the existing structure, not demolish it. *Id.* In support of this conclusion, the Decision cited to the testimony of Petitioner's architect and engineer that the framing, roof rafters, and sheathing would be retained and credited board member Jeffrey Russo's opinion as a general contractor that the proposal did not involve a demolition. *Id.*

E

Procedural History

On April 27, 2021, Appellant Watch Hill Fire District filed a Complaint challenging the Zoning Board's Decision. (Docket, WC-2021-0195.) On April 28, 2021, the remaining Appellants filed a substantially similar Complaint. (Docket, WC-2021-0199.) On May 24, 2021, Appellants amended both Complaints to add Zoey Watch Hill, LLC as an additional appellee. *See id.*; Docket, WC-2021-0195. On September 9, 2021, the Court allowed the parties' stipulation that WC-2021-0195 and WC-2021-0199 be consolidated. *See* Docket, WC-2021-0195.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
> "(1) In violation of constitutional, statutory, or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d).

Where a challenge to a board decision rests on an issue of law, the Superior Court conducts a *de novo* review. *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005). Otherwise, this Court must "'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" *Lloyd v. Zoning Board of Review for the City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). "'Substantial evidence'" is "'relevant evidence that a reasonable mind might accept as adequate to support a conclusion[] and means [an] amount more than a scintilla but less than a preponderance.'" *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)). This Court may not "substitute its judgment for that of the zoning board if it can conscientiously find that the board's decision was supported by substantial evidence in the whole record." *Apostolou*, 120 R.I. at 509, 388 A.2d at 825.

III

Analysis

Under the State Enabling Act, a zoning board must require that an applicant for a dimensional variance enter evidence into the record satisfying the following standards:

> "(1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(a)(16);
> "(2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;
> "(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and
> "(4) That the relief to be granted is the least relief necessary." Section 45-24-41(d).

Accord Westerly Zoning Ordinance § 260-33(D) (including substantially similar language). When reviewing a request for a dimensional variance, a zoning board must also "require that evidence is entered into the record of the proceedings showing that . . . the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience." *See* § 45-24-41(e)(2); *see also* Westerly Zoning Ordinance § 260-33(E)(2).

Appellants contend that the Zoning Board's Decision was clearly erroneous in the absence of substantial evidence in the record satisfying three of the five statutory requirements: (1) § 45-24-41(d)(1), whether there exists a legally cognizable hardship to the land or structure, (2) § 45-24-41(d)(4), whether Petitioner's proposal seeks the least relief necessary, and (3) § 45-24-41(e)(2), whether the hardship is more than a mere inconvenience. *See generally* Watch Hill Fire District's Mem. of Law (Appellants' Mem.). Appellants further argue that the Zoning Board applied an improper legal standard for dimensional variances in light of the Rhode Island Supreme Court's recent decision in *New Castle Realty Co. v. Dreczko*, 248 A.3d 638 (R.I. 2021) (hereinafter *New Castle*). (Appellants' Mem. 9-14.) Finally, Appellants aver that Petitioner's proposal involves a demolition of the structure, not a renovation, and therefore violates Westerly Zoning Ordinance § 260-32(C)(2). *Id.* at 23-28. For the reasons to follow, the Court disagrees.

A

Dimensional Variance Standard

1

Section 45-24-41(a), Hardship

Appellants first contend that "[o]wnership of a grandfathered non-conforming property is not a hardship, it is a benefit," (Appellants' Mem. 19), and that to hold otherwise will

"essentially undo all of the deliberate restrictions placed on nonconforming lots in violation of Rhode Island law and public policy." *Id.* at 20 n.10. In support, Appellants cite to *Sullivan v. Zoning Board of Review for City of Providence*, No. 87-3611, 1989 WL 1110283, at *2, *3 (R.I. Super. Mar. 28, 1989). *Sullivan*, however, is inapposite as it involves a *use* variance, which has a higher evidentiary standard than a *dimensional* variance. *See id.* at *1. *Compare* § 45-24-41(e)(1) (use variance standard) *with* § 45-24-41(e)(2) (dimensional variance standard). The *Sullivan* court did not address whether the petitioner had satisfied the dimensional variance hardship standard; rather, it determined that the petitioner's desire to have four apartment units instead of the existing three units in a nonconforming multi-unit building in a single-family zone did not meet the standard of "a deprivation of all beneficial use of one's land," which is the *use variance* standard. *Id.* at *2.[6]

Contrary to Appellants' viewpoint, ownership of a grandfathered nonconforming lot may constitute substantial evidence of hardship. *See DiDonato v. Zoning Board of Review of Town of Johnston*, 104 R.I. 158, 163, 242 A.2d 416, 419 (1968) ("Inasmuch as the ordinance makes it impossible for lot 386 to be used for any permitted use, it is apparent that petitioner has met the requirement of establishing unnecessary hardship within the meaning of [§ 45-24-19(d)]."). Like

[6] For similar reasons, Appellants' other cited cases are unhelpful. *See* Appellants' Mem. 18-19 (citing *Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 402 (R.I. 2001) and *Gartsu v. Zoning Board of Review of City of Woonsocket*, 104 R.I. 719, 720, 248 A.2d 597, 598 (1968)). Like *Sullivan v. Zoning Board of Review for City of Providence*, No. 87-3611, 1989 WL 1110283 (R.I. Super. Mar. 28, 1989), *Gartsu* involved a nonconforming use, not a dimensional variance. *Gartsu*, 104 R.I. at 721, 248 A.2d at 597. *Bernuth* applied the dimensional variance standard in place prior to a 2002 legislative act amending the standard. *See* § 45-24-41(d)(2), as amended by P.L. 2002, ch. 384, § 1 (removing statutory text defining "mere inconvenience" as "no other reasonable alternative to enjoy a legally permitted beneficial use of one's property"); *see also Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 691-92 (R.I. 2003) (explaining legal effect of 2002 amendment). As will be discussed *infra*, our Supreme Court did not overturn the *Lischio* decision in *New Castle Realty Co. v. Dreczko*, 248 A.3d 638 (R.I. 2021).

the property owner in *DiDonato*, the record in this case shows that Petitioner owns a nonconforming lot with overlapping setbacks creating "an impossible situation to legally build anything on this parcel," notwithstanding the existing structure. *See* Decision 10-11, ¶ 1; *see also* Tr. 7:1-2, Dec. 3, 2020. There is also substantial evidence in the record that Petitioner's lot is one-seventh the minimum required lot size for the zone and a figure "seven" shape. (Decision 10-11, ¶ 1; Tr. 41:1-7, Dec. 3, 2020; Appl. Ex. "Parcel Map.")

In addition to the lot's challenging characteristics, the record contains evidence of the unique characteristics of the structure itself—an apartment over a garage measuring approximately 577 square feet in a single-family residential zone. (Tr. 13:22, Dec. 3, 2020); Tr. 60:16-20, 62:18-20, Mar. 25, 2021.) The Zoning Board also heard testimony that HUD recommends 960 square feet for a minimally habitable single-family residence. (Tr. 62:13-63:16, Mar. 25, 2021.) Contrary to Appellants' argument that HUD recommendations are irrelevant, the Zoning Board could properly consider such facts in its hardship determination. *See* § 45-24-41(d) (contemplating hardship resulting from "unique characteristics of the subject land *or structure*") (emphasis added). Unlike *New Castle* and *DiDonato*, where each petitioner's desire for a larger home was supported by nothing more than personal preference, the HUD recommendation offered the Zoning Board objective evidence beyond Petitioner's mere personal perception of the inadequacy of the Property's living space. *Accord Cassese v. Zoning Board of Review for the Town of Middletown*, No. NC10-0293, 2012 WL 115456, at *6 n.2 (R.I. Super. Jan. 11, 2012) (observing *DiDonato* Court did not foreclose consideration of personal circumstances in zoning applications and does not rule out consideration of such considerations "as a *factor* in any such analysis") (emphasis added).

It is the Zoning Board's explicit prerogative to weigh the evidence and make factual determinations. Section 45-24-69(d). This Court may not "substitute its judgment for that of the zoning board if it can conscientiously find that the board's decision was supported by substantial evidence in the whole record." *Apostolou*, 120 R.I. at 509, 388 A.2d at 825. Considering *DiDonato* and the record evidence cited above, the Zoning Board's determination that Petitioner sought relief from a hardship due to the unique characteristics of the preexisting, substandard lot and undersized structure was not clearly erroneous.

2

Section 45-24-41(e)(2), "More than a Mere Inconvenience"

Contrary to Appellants' assertion that finding a hardship in this case will render zoning regulations "meaningless," (Appellants' Mem. 20 n.10), the Zoning Enabling Act contains additional requirements to balance the sometimes-conflicting burdens of hardship suffered and the relief sought. To that end, an applicant for a dimensional variance must also show "that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience." Section 45-24-41(e)(2). The Rhode Island Supreme Court established the "more than a mere inconvenience" standard in *Viti v. Zoning Board of Review of City of Providence*, 92 R.I. 59, 64-65, 166 A.2d 211, 213 (1960), which thereafter became known as "the *Viti* doctrine." *See, e.g., Lischio*, 818 A.2d at 691. The State Enabling Act of 1991 superseded the *Viti* doctrine and established a more demanding hardship standard, defining "mere inconvenience" to mean "that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property." *See* § 45-24-41(d)(2), as amended by P.L. 1991, ch. 307, § 1; *see also Sciacci v. Caruso*, 769 A.2d 578, 582 (R.I. 2001). This standard was relatively short-lived, however, because the Legislature amended the variance section of the

Enabling Statute in 2002 to remove the "no other reasonable alternative" clause. *See* § 45-24-41(d)(2), as amended by P.L. 2002, ch. 384, § 1. While noting that the Legislature failed to remove similar language from the definition section of the Enabling Act—now § 45-24-31(66)(ii)—our Supreme Court nevertheless acknowledged that "the 2002 amendment reinstate[d] the judicially created *Viti* doctrine." *See Lischio*, 818 A.2d at 691, 691 n.6. The language of the 2002 amendment persists today. Section 45-24-41(e)(2).

Even though there has been no intervening statutory change since 2002, Appellants argue that our Supreme Court overturned *Lischio* by referencing the definitional language in § 45-24-31(66)(ii) in *New Castle*.[7] *New Castle*, 248 A.3d at 648. Appellants therefore contend that *New Castle* overturned a twenty-year precedent without discussion of *Lischio*, the *Viti* doctrine, or the statutory history of § 45-24-41 and without a request or related briefing on the issue by either *New Castle* party. *See generally New Castle*, 248 A.3d at 648-49; Brief for Petitioner New Castle Realty Co., *New Castle*, 248 A.3d 638 (No. 2018-65-M.P.); Brief of Respondent, *New Castle*, 248 A.3d 638 (No. 2018-65-M.P.).

The Rhode Island Supreme Court "'always makes a concerted effort to adhere to existing legal precedent.'" *Air Distribution Corp. v. Airpro Mechanical Co.*, 973 A.2d 537, 541 (R.I. 2009) (quoting *Pastore v. Samson*, 900 A.2d 1067, 1077 (R.I. 2006)). Our Supreme Court has stated that "[a]lthough it is not a jurisprudential principle that admits of absolutely no exceptions, the principle of *stare decisis* is nonetheless one of the most basic norms in our legal system." *Id.* at 541 n.6. Particularly relevant to this analysis, "*stare decisis* 'has more force in statutory

[7] The *New Castle* opinion issued on April 13, 2021. *New Castle*, 248 A.3d at 638. On June 4, 2021, two state representatives introduced House Bill 2021-H 6395, amending § 45-24-31(66)(ii) to remove the "no reasonable alternative" clause and substitute that "the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience." The House passed the bill on June 23, 2021. As of the filing of this Decision, the Senate has not taken up an equivalent act.

analysis than in constitutional adjudication because, in the former situation, [the Legislature] can correct [the Court's] mistakes through legislation.'" *Strynar v. Rahill*, 793 A.2d 206, 209-10 (R.I. 2002) (Flanders, J. concurring) (quoting *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 695 (1978)). When our Supreme Court does find it necessary to depart from precedent, it generally does so explicitly and typically with a lengthy discussion of the basis for its departure. *See, e.g., Frazier v. Liberty Mutual Insurance Co.*, 229 A.3d 56, 58-61 (R.I. 2020); *State v. Coleman*, 984 A.2d 650, 656 (R.I. 2009); *State v. Gautier*, 871 A.2d 347, 357-60 (R.I. 2005).

For the above reasons, Appellants' implied interpretation of *New Castle* as overturning the *Viti* doctrine is unreasonable. Instead, a fair reading of *New Castle* leads to the conclusion that a petitioner must consider "reasonable alternatives" to satisfy the § 45-24-41(d)(4) "least relief necessary" requirement for a dimensional variance. *New Castle*, 248 A.3d at 648. The *New Castle* Court relied upon the "no reasonable alternative" language to uphold the trial court's determination that an applicant's "unwilling[ness] 'to consider suggestions'"—i.e. alternatives—solely because the alternative proposal would be less valuable meant that the record supported the zoning board's determination that the applicant had "failed to establish that the requested relief was the least relief necessary." *Id.* *Accord Caldwell v. Zoning Board of Review of the Town of Narragansett*, No. WC-2018-0005, 2022 WL 842569, at *12 (R.I. Super. Mar. 15, 2022) (applicant's failure to consider smaller house in lieu of proposal with four bedrooms, four bathrooms, and an elevator did not satisfy requirement of least relief necessary). Although the *New Castle* Court stated the § 45-24-31(66)(ii) definitional language in full, the Court's discussion of a "reasonable alternative" did not otherwise rely on the second half of the definitional clause pertaining to whether the applicant could enjoy a "legally permitted beneficial

use of the subject property." *See generally id.* As a result, Appellants read too much into the *New Castle* Court's invocation of § 45-24-31(66)(ii).

So cabined, *New Castle* does not alter the long-standing statutory standard for a dimensional variance. As previously discussed by the Rhode Island Supreme Court, "more than a mere inconvenience" means "that an applicant must show that the relief he is seeking is *reasonably necessary for the full enjoyment of his permitted use*." *DiDonato*, 104 R.I. at 164, 242 A.2d at 420 (emphasis added). Stated differently:

> "It [is] . . . the obligation of the applicant to establish by the introduction of competent evidence that to require full compliance with the terms of the ordinance in these respects would, so far as the applicant was concerned, constitute more than a mere inconvenience and adversely affect its *full enjoyment of the permitted use*." *DiIorio v. Zoning Board of Review of City of East Providence*, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969) (emphasis added).

Thus, it remains the law in Rhode Island that "landowners" are "not required to demonstrate a loss of all beneficial use[.]" *See Lischio*, 818 A.2d at 691; *see also Gardiner v. Zoning Board of Review of City of Warwick*, 101 R.I. 681, 689, 226 A.2d 698, 702 (1967) (applying *Viti* doctrine and stating "the applicant is not required to prove a loss of all beneficial use").

Turning to the record in this case, the Zoning Board's oral deliberations at the March 25, 2021 hearing and its written Decision reflect the proper standard under the *Viti* doctrine of reasonable or full enjoyment of a permitted use. The written Decision stated that "[t]here is a hardship if strict adherence to the dimensional requirements interferes with the *reasonably full enjoyment of uses permitted on the property*[.]" (Decision 10) (emphasis added). Zoning Board Vice-Chairman Lawrence Cioppa similarly stated that "if we had strict adherence to the zoning code, here, I truly believe that [Petitioner] could not have any *reasonable full enjoyment of his property*." (Tr. 182:10-13, Mar. 25, 2021) (emphasis added). According to board member

Jeffrey Russo, Petitioner "met the standards of relief, that it's *reasonable and necessary for full enjoyment of his potential use*." *Id.* at 183:17-19 (emphasis added). Member James Torres drew a distinction between the permitted use of a single-family residence and the small apartment available in Petitioner's structure, reasoning that denial of the Application would constitute more than a mere inconvenience because it would deprive the property owner of its permitted use—which is a single-family residence, not an apartment. *Id.* at 191:2-7, 194:8-12, 195:10-17. Member Dawn Robinson referenced the standard in plainer terms, opining that "Mr. Schwartz is entitled to have a house that he can live in," thereby permissibly crediting the HUD evidence of habitability. *Id.* at 197:2-3. Similarly, Chairman Walter Pawelkiewicz determined that denying the variance would deny Petitioner a "standard size house for habitability and functionality[.]" Id. at 198:10-16. The Zoning Board did not err in invoking the language of the *Viti* doctrine when considering Petitioner's request for a dimensional variance.

Appellants' reliance on the more demanding language of the Westerly Zoning Ordinance does not alter this outcome. *See* Westerly Zoning Ordinance § 260-9(B) (requiring applicants to show "that there is no reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief"). Appellants "gain nothing from such ordinance since the power to grant variances is a direct grant of authority from the legislature to boards of review and can be neither enlarged nor restricted by provisions contained in local ordinances." *Gardiner*, 101 R.I. at 691, 226 A.2d at 703-04.

Appellants similarly gain nothing by citing to three Superior Court cases that reference the more demanding language that predated the 2002 amendment. *See* Appellants' Mem. 12 (citing *Frenchtown Investors, LLC v. Zoning Board of Review of the Town of North Kingstown,* No. WC-2019-0237, 2020 WL 5651033, at *4 (R.I. Super. Sept. 17, 2020); *Fidas v. Town of*

Coventry Zoning Board of Review, No. KC-2014-0825, 2017 WL 3784444, at *3 (R.I. Super. Aug. 23, 2017); and *S.G. Associates, Inc. v. Rengigas*, No. KC-2015-0818, 2017 WL 3387179, at *10 (R.I. Super. July 31, 2017)). In both *Frenchtown Investors* and *S.G. Associates*, Superior Court justices upheld grants of dimensional variances as supported by substantial evidence in the records; therefore, any references to a more demanding standard were harmless. *See Frenchtown Investors, LLC*, 2020 WL 5651033, at *10; *S.G. Associates, Inc.*, 2017 WL 3387179, at *12. Similarly unavailing, the *Fidas* court determined that the record was insufficient to permit judicial review, so any reference to the pre-2002 statutory language was mere dicta. *Fidas*, 2017 WL 3784444, at *5.

3

Section 45-24-41(d)(4), Least Relief Necessary

Having determined that the record supports a determination that Petitioner sought relief from a hardship amounting to more than a mere inconvenience, § 45-24-41(d)(4) further requires that an applicant seeking a dimensional variance must demonstrate "[t]hat the relief to be granted is the least relief necessary." Section 45-24-41(d)(4). "Least relief" means that "the burden is on the property owner to establish that the relief sought is minimal to a reasonable enjoyment of the permitted use to which the property is proposed to be devoted." *See Standish-Johnson Co. v. Zoning Board of Review of City of Pawtucket*, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968). When a petitioner is confronted with proposed alternatives, "least relief necessary" means that an applicant's failure to consider reasonable proposals may violate § 45-24-41(d)(4). *New Castle*, 248 A.3d at 648; *Caldwell*, 2022 WL 842569, at *9.

Unlike *New Castle* and *Caldwell*, however, where applicants failed to consider reasonable alternative proposals, the record in this case demonstrates that Petitioner did consider

alternatives and even modified his design between December 2020 and March 2021, reducing the size of the second deck to avoid additional encroachment. (Tr. 98:3-15, Mar. 25, 2021.) Therefore, the question in this case is not whether Petitioner considered reasonable alternatives, but whether those alternatives demonstrated that Petitioner could have eased his hardship by lesser means such that the Zoning Board's Decision was clearly erroneous or an abuse of discretion. *See* § 45-24-69(d)(5)-(6). This Court will therefore assess those alternatives to determine whether the record adequately supports the Zoning Board's determination. *See Lloyd*, 62 A.3d at 1083 (quoting *Apostolou*, 120 R.I. at 507, 388 A.2d at 824) (courts must "'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence'").

a

The "Do Nothing" Alternative

At the December Zoning Board hearing, Appellants' counsel asked Petitioner:

> "[T]here's been a lot of talk about the FEMA regulations requiring you to do things, the current FEMA regulations that exist don't require you to do anything with the home, you could live in that home the way it is for the next 10 years without making any improvements and be compliant with FEMA; isn't that correct, Mr. Schwartz?" (Tr. 45:7-13, Dec. 3, 2020.)

Appellants reference a similar argument in their briefing to this Court. (Appellants' Mem. 15-16.) In sum, Appellants suggest that a reasonable alternative would be to "do nothing." There exists substantial evidence in the record, however, to support the determination that living in the home "the way it is" was not a viable alternative. At minimum, Petitioner and his expert testified that the structure required new windows, shingles, and trim, as well as changes to entrances and stairs to comply with the building code. (Tr. 13:11-24, 46:19-25, Dec. 3, 2020.) Petitioner also desired to update the kitchen and bathroom, both original to the 1938 home. *Id.* at

13:14-16. Petitioner further testified that the exterior of the home was so badly damaged that there were birds nesting in the structure. *Id.* at 46:22-24. Numerous public commentors—those generally opposed to the proposal—also acknowledged that the structure was in disrepair and explicitly stated that they welcomed renovation. (Tr. 66:2-4, 72:15-21; 79:7-8; 83:23-84:2, Dec. 3, 2020; R. § 4, Ex. "Letter from Joan Beth Brown on behalf of Watch Hill Fire District" 4.) In light of the facts on this record, the Zoning Board did not act arbitrarily in impliedly determining that retaining the structure "the way it is" would not afford Petitioner necessary relief.

b

The "Just Renovate" Alternative

Appellants further assert that because Petitioner "could weatherize the home without increasing its size or adding decks and bathrooms," the relief granted was not the least necessary. (Appellants' Mem. 21.) There exists substantial evidence in the record, however, to support a conclusion that this suggestion was not viable due to the interplay between the extent of the structure's necessary renovations—summarized above—Petitioner's desire to improve the structure's flood resilience, and the HUD habitability standard for square footage in a single-family home.

Petitioner and his experts offered evidence that renovation costs, exclusive of elevating the structure, would well exceed $24,000. (Tr. 11:7-20, Dec. 3, 2020; Tr. 68:23-69:5, Mar. 25, 2021.) They further stated that by spending in excess of 50 percent of the structure's assessed value—approximately $24,000—on renovation, Petitioner would incur obligations to comply with FEMA and additional town building codes. (Tr. 14:2-6, 34:1-11, 40:19-23, Dec. 3, 2020.) Evidence in the record indicated that FEMA and building code compliance, in turn, would require replacing the foundation with a frangible slab, decreasing the size of the enclosed garage

level to 300 square feet or less, and replacing the garage-level walls with materials designed to breakaway in storm conditions. (Tr. 16:23-25, 36:19-24, Dec. 3, 2020; Tr. 103:11-14, Mar. 25, 2021.) Although the necessity of raising the structure was debated throughout the hearings, the record nevertheless demonstrated that Petitioner desired to improve the Property's flood resiliency by, at minimum, renovating the garage and installing supporting helical piles. (Tr. 5:13-19, Mar. 25, 2021.) Petitioner is also required to remove the existing cesspool in compliance with Department of Environmental Management standards, replacing an underground system with an above-grade denitrification system, reducing available lot space for outdoor enjoyment. (Tr. 6:11-24, 28:13-25, Dec. 3, 2020.)

Taken together, the record therefore contains substantial evidence that the Property's necessary renovations would reduce interior space in the garage level and reduce the usable exterior space on the lot for a structure that already offered approximately half the recommended living space according to HUD guidelines. It was therefore not arbitrary or clearly erroneous for the Zoning Board to determine that an alternative proposal that necessitated substantial investment and decreased overall usable space without affording Petitioner any other relief would not permit "full enjoyment" of the Property. *DiDonato*, 104 R.I. at 164, 242 A.2d at 420.

Appellants' remaining argument that the Petitioner does not require additional bathrooms and decks challenges a discretionary determination squarely within the Zoning Board's remit, as long as the record supports such a determination, which it does. The record shows that the decks on the living level will not further encroach in any direction. (Tr. 67:3-5, Mar. 25, 2021.) The record further reflects that the roof deck was proposed to conceal heating and cooling apparatus so as not to be an eyesore on the side of a house in the midst of a highly trafficked tourist area and to minimize noise at street and living levels. (Tr. 7:24-8:3, 18:3-17, Dec. 3, 2020.).

Witnesses further testified that the proposed bathrooms are of average size at sixty square feet; the bedrooms would generally be considered small at eight-and-a-half by fifteen feet; and the proposed great room would be used for both living and dining. (Tr. 49:4-54:21, Mar. 25, 2021.) Petitioner's experts testified that the proposal also does not increase overall floor to ceiling heights. *Id.* In any event, as observed in a similar case:

> "The relief requested in this case is not dictated by the amount of living space or storage space in the new structure, but rather by the placement of the dwelling on the pre-existing, nonconforming lot . . . Certainly, had the Applicants sought to increase living space and storage space by expanding the one-story dwelling horizontally rather than vertically, then Appellant's contention that the relief sought is not the least relief necessary would be more meritorious. However, that hypothetical further supports the fact that Applicants' request is indeed the least relief necessary as there is no change in the footprint but rather in height only, and even so, the proposed height complies with the height restrictions imposed by the Zoning Ordinance." *Montaquila v. Zoning Board of Review of the City of Warwick*, No. KC-2010-1567, 2012 WL 2995413, at *7 (R.I. Super. July 18, 2012).

4

Appellants' Additional Arguments

Appellants state that they do not challenge § 45-24-41(d)(2), whether Petitioner created the hardship or is motivated by a desire for financial gain. (Watch Hill Fire District's Reply Mem. (Appellants' Reply Mem.) 11.) Yet, in their initial memorandum, Appellants assert in a footnote that Petitioner's "motive is a larger home and financial gain." (Appellants' Mem. 21 n.11). Appellants also contend in their Reply Memorandum that they do not challenge whether granting the variance will alter the general character of the surrounding area in violation of § 45-24-41(d)(3). *See* Appellants' Reply Mem. 11. Appellants did, however, discuss this element in their initial memorandum. *See* Appellants' Mem. 23. Specifically, they argued in their opening brief that Petitioner's proposal is "out of character" because it is too high, is higher than it is

wide or deep, and will tower over the neighboring carousel. *Id.* Because it is unclear whether Appellants abandon these arguments, this Decision will pause to briefly address these issues.

As to § 45-24-41(d)(2), the Zoning Board heard substantial evidence that Petitioner's primary motive was not financial gain. Petitioner testified that he and his wife use the Property as a personal vacation home, (Tr. 79:23-80:1, Dec. 3, 2020); that they do not rent the Property, *id.* at 80:10-11; and that they do not intend to "flip it," *id.* at 80:24-81:1. Although the variance statute provides that "[t]he fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief," § 45-24-41(e)(2), it does not follow that an increase in value is a bar to relief. *Accord Lang v. Zoning Board of Review for the Town of Middletown*, No. NC-2011-0302, 2013 WL 1090819, at *7 (R.I. Super. Mar. 13, 2013) ("Indeed, most variances are likely to confer some financial benefit upon the property owner when granted. The prohibition set forth in [§ 45-24-41(d)(2)] concerns whether the alleged hardship itself is a desire for financial gain or a self-created need, not whether some financial benefit might possibly accrue to the applicant.").

As to § 45-24-41(d)(3), Appellants' argument that the proposed structure will be towering or "too high" is unprevailing. The proposal does not exceed the maximum height restriction for the zone. *See* Appl. 2; *see also Lischio*, 818 A.2d at 693 (inquiry for a permissible use "is confined to the extent and nature of the dimensional relief requested"). Appellants' remaining argument, that the proposed residence is higher than it is wide or deep, addresses the three-dimensional mass of the structure. The Rhode Island Supreme Court dealt with a similar challenge in *Lloyd*. *See Lloyd*, 62 A.3d at 1088. The *Lloyd* Court reasoned that a zoning board does not err by refusing to accept a challenger's argument that an increase in height intensifies an existing nonconformity when the zoning ordinance "does not contemplate a calculation of

building mass or three-dimensional spaces[.]" *Id.* at 1088-89. Like the Newport ordinance at issue in *Lloyd*, Westerly's dimensional requirements do not consider three-dimensional mass. *See* Appl. 2 (addressing only side, rear, front, and height). Further, the record contains substantial evidence relating to the dimensions of the structure such that the Zoning Board's determination was neither arbitrary nor clearly erroneous. *See, e.g.*, Tr. 14:24-15:7, Dec. 3, 2020 (top of railing of roof deck will be thirty-three feet, not exceeding thirty-five-foot zoning regulation); *id.* at 82:25-83:3 (statement of counsel that there are no view easements granted in Westerly); *id.* at 14:20-23 (proposed structure would continue to occupy the same footprint).

B

Zoning Ordinance § 260-32(C)(2), Demolition or Renovation

Appellants' final argument is that the Westerly Zoning Ordinance precludes construction of a dimensionally noncompliant residence following voluntary demolition of the original structure. *See* Westerly Zoning Ordinance § 260-32(C)(2). Appellants reason that Petitioner will demolish the subject home and that it is impossible to rebuild due to the overlapping setbacks. In response to Petitioner's claim that his proposal seeks only to "elevate and renovate" the existing structure, not demolition it, Appellants contend that retaining some exterior framing and roof trusses does not save this project from being a "demolition."

Section 260-32(C)(2) states:

> "Destruction or demolition. A nonconforming structure which is destroyed or damaged by any means which is beyond the control of the owner shall be rebuilt or restored within one year, or thereafter conform to the dimensional provisions of this Zoning Ordinance. If a nonconforming building or structure is demolished or removed by or for its owner, it shall not be rebuilt or replaced except in conformity with the dimensional requirements of this Zoning Ordinance."

At issue is the meaning of the undefined term "demolition," a question of statutory interpretation necessitating *de novo* review. An ordinance is interpreted in the same manner as a statute. *City of Woonsocket v. RISE Prep Mayoral Academy*, 251 A.3d 495, 500 (R.I. 2021) (hereinafter *RISE*); *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 541 (R.I. 2008). An undefined word in an ordinance must be given its plain and ordinary meaning unless the word is ambiguous and susceptible to more than one meaning. *State ex rel. Town of Tiverton v. Pelletier*, 174 A.3d 713, 722 (R.I. 2017); *Middle Creek Farm, LLC v. Portsmouth Water & Fire District*, 252 A.3d 745, 751 (R.I. 2021).

To "demolish" is "to destroy or ruin (a building or other structure), [especially] on purpose; [to] tear down; [or] raze." *Random House Dictionary of the English Language* 530 (2d ed. 1987). To raze is to "level to the ground." *Id.* at 1605. To determine whether the Petitioner's structure would be leveled to the ground, the Zoning Board credited the testimony of Petitioner's architect, Wayne Garrick; Westerly zoning official, Nathan Reichert; and Zoning Board member Jeffrey Russo, a general contractor whose opinion was that this project involves an elevated renovation, not a demolition. (Decision 6, 13; Tr. 7:17-21, 13:6-11, Dec. 3, 2020; Tr. 42:4-8, 70:6-12, Mar. 25, 2021.) In line with the dictionary definition, Mr. Reichert described a demolition as "remov[ing] the entire structure and start[ing] over." (Tr. 71:1-72:13, Mar. 25, 2020.) Under this view, retaining the framing, roof trusses, and sheathing does not demolish the "entire structure." *Accord RISE*, 251 A.3d at 500 (stating clear and unambiguous language is given its plain and ordinary meaning).

Two primary canons of statutory construction bolster this interpretation. First, doubts as to the zoning law should be resolved "in favor of the landowner because these regulations are in derogation of the property owner's common-law right to use [its] property as [it] wishes."

Denomme v. Mowry, 557 A.2d 1229, 1231 (R.I. 1989). Second, "when the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency, or board, charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized." *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859-60 (R.I. 2008). This Court therefore declines Appellants' invitation to attempt to resolve the problem of the Ship of Theseus and need not opine on how much house can be replaced before Petitioner has built a new house.[8] Instead, the Zoning Board's determination that the proposal did not involve a demolition because it did not

[8] It is worth noting that Appellants inconsistently assert this demolition argument. At the December hearing, Appellants' attorney stated:

> "I just want to make clear, at least from our perspective what's at issue and what's not at issue. Nobody at the conservancy or the fire district want to deny Mr. Schwartz the opportunity to replace the septic system or to improve this house or to change the shingles or replace the windows or improve the foundation or add breakaway walls or recess the garage doors, all of the things he talked about. Nobody on my side of the fence, at least, is objecting to that . . . . What divides us is going from 475 square feet of living space, which is what's listed on the town record, to the 1230 square feet of habitable space that Mr. Garrick testified to in his testimony. We're taking the structure, and we're more than doubling the habitable space." (Tr. 83:9-84:11, Dec. 3, 2020.)

Yet, just minutes later, Appellants' attorney objected to those very same acts, arguing:

> "[T]here's going to be a new foundation, new windows, new decks, new doors, new floors, just about new everything. I argue to you that that clearly meets the definition of a demolition here. What's going to happen is you're going to have an entirely new house, and your ordinance does not allow somebody to knock down a nonconforming home and build a bigger one. The owner can't do that, not in my opinion, that's your regulation in [(C)(2)], and I submit that that's what's happening here." *Id.* at 90:8-16.

Under any definition, the difference between a demolition and a renovation is not dependent on the resulting square footage or height of the structure, and the Zoning Board did not act arbitrarily or unreasonably when it failed to credit this inconsistent argument.

tear down or raze the entire structure was reasonable in light of the plain language of the Zoning Ordinance and was otherwise supported by the record.

IV

Conclusion

For the reasons stated above, the Zoning Board applied the proper legal standard for dimensional variances when assessing Petitioner's Application and its Decision is supported by substantial evidence in the record. This Court therefore affirms the Decision of the Zoning Board. Counsel shall prepare the appropriate order.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Watch Hill Fire District v. Westerly Zoning Board of Review, et al.** **Consolidated with** **MacLear Family Revocable Trust, et al. v. Westerly Zoning Board of Review, et al.**
CASE NOS:	**WC-2021-0195 consolidated with WC-2021-0199**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**October 20, 2022**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
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For Defendants:	**Scott D. Levesque, Esq.**
For Interested Party:	**Kelly M. Fracassa, Esq.**